IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

80-5972

BARBARA SUE RUHL,

Appellant,

v.

ALABAMA STATE BAR,

Appellee.

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SUPREME COURT, U.S.

ON APPEAL FROM THE SUPREME COURT OF ALABAMA

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Did the Supreme Court of Alabama err in holding the Rules Governing Admission to the Alabama State Bar constitutional even though they failed to provide a redress for grievances resulting from a substantive error in the grading of a bar examination.

2. Did the Alabama Supreme Court deny a bar examinee her due process right to practice a lawful profession when it failed to certify her on the basis of a substantive error in the grading of her bar examination.

The parties to the proceeding in the Alabama Supreme Court were the Board of Commissioners of the Alabama State Bar, Oakley Melton, Jr., Reginald T. Hamner, and William H. Morrow, Jr., President, Secretary, and General Counsel, respectively, of the Alabama State Bar.

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IN THE SUPREME COURT OF THE UNITED STATES
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BARBARA SUE RUHL,	)
	)
Appellant,	)
	)
v.	)
	)
BOARD OF COMMISSIONERS OF ALABAMA STATE BAR,	)
	)
Appellee.	)

JURISDICTIONAL STATEMENT - STATE CIVIL CASE

Opinions Below

The opinion of the Alabama Supreme Court entered September 26, 1980 is set out in the Appendix hereto. The decision of the Alabama Supreme Court is not reported.

Jurisdiction

This action for the establishment of a greivance procedure for bar examinees and the certification of the appellant to the practice of law in Alabama draws in question the validity of the Rules Governing Admission to the Alabama State Bar on the ground that the failure to provide a remedy to correct a substantive error in the grading of a bar examination is repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States. The rules deny the property right to follow a lawful profession by failing to afford Constitutional protection before that right is arbitrarily taken away through a mistake in the grading of the bar examination.

The federal constitutional question was timely raised by the appellant when the case was submitted to the Alabama Supreme Court on a petition for mandamus requesting the Supreme Court to require the Board of Commissioners of the Alabama State Bar to establish procedures that will provide redress for grievances for substantive errors in the grading of the bar examination, and requesting the Supreme Court to admit her to the practice of law in the State of Alabama on the basis of her qualifications established in the July, 1979, Bar Examination.

Notice of appeal to this Court was timely filed on December 22, 1980.

The jurisdiction of the United States Supreme Court to review this decision of the Supreme Court of Alabama on appeal is conferred by 28 U.S.C. § 1257(2). The following are decisions which sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case, by extending the scope of "state statute" to include rules promulgated by state supreme courts and board of commissioners of the state bar governing the admission to the practice of law in that state.

Numerous cases exist which explain the meaning of "statute" for the purposes of appeal under § 1257(2). One of the earliest cases to address this issue of the scope of "state statute" was Williams v. Bruffy, 96 U.S. 176, 182 (1877), where the court stated that any enactment, from whatever source originating, to which a State gives the force of law is a statute of the State, within the meaning of the clause cited relating to the jurisdiction of this Court. It would be a narrow construction to limit the term to such enactments as have gone through various stages of consideration by the legislature.

In holding that an order by the Regents of the University of California was a statute of the State, the Supreme Court in Hamilton v. Regents, 293 U.S. 245, 258 (1934) stated that the phrase is used to include every act legislative in character to which the State gives sanction, no distinction being made between acts of the State legislature, and other exertions of the state law-making power. The Supreme Court has upheld jurisdiction on appeal of challenges to other non-legislative rulings, including orders of state regulatory commissions, e.g. Lake Erie & Western R. Co. v. State Public Utilities Comm'n, 249 US 422 (1919), and; municipal ordinances, e.g. King Manufacturing Co. v. City Council of Augusta, 277 US 100, 104 (1928); Jamison v. Texas, 318 US 413 (1943).

The Supreme Court of the United States squarely addressed the issue of whether orders by the State Bar are "statutes" for the purposes of appeal under § 1257(2) in Lathrop v. Donohue, 367 US 820 (1961). The Court stated that the legislative character of the challenged state action, rather than the nature of the agency of the State performing the act, is decisive of the question of jurisdiction. The jurisdictional provision uses the words "a statute of any State" in their larger sense and is not intended to make a distinction between acts of a state legislature and other exertions of the State's law-making power, but rather to include every act legislative in character to which the State gives its sanction.

In concluding that an order by the Supreme Court of Wisconsin to integrate the Bar was a state statute, the court noted that the order bore no resemblance to adjudication, and that the State Supreme Court's action disposed of no litigation between parties. Rather, the court

sought to regulate the profession by applying its orders to all present members of the Bar and to all persons coming within the described class in the future. As such, the action had the characteristics of legislation.

Rules governing Admission to the Alabama State Bar are effected through an interplay of action by the legislature, the Board of Commissioners of the Alabama State Bar, and the court directed to fashioning a policy for the administration of the legal profession. Section 34-3-2 of the Alabama Code (1975) gives the Board of Commissioners the power and authority to prescribe rules and regulations governing the conduct of the examiners and the certifications of persons found to be qualified. Section 34-3-43 gives the Board the power to conduct through a board of examiners the examination of applicants, and to determine, by rules, the qualifications and requirements for admission to the practice of law. Consequently, the Rules Governing Admission to the Alabama State Bar should be considered a state statute for the purposes of appeal under § 1257(2).

This is the final judgment of the highest court in the state. A Rehearing was not requested because judicious and efficient use of time mandated avoidance of a re-attempt of an act which had previously proved futile.

Constitutional and Statutory Provisions

The Fourteenth Amendment to the Constitution of the United States provides in Section 1 as follows: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or

immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

Rules Governing Admission to the Alabama State Bar, adopted by the Board of Commissioners of the Alabama State Bar and approved by the Supreme Court of Alabama are set out in full in the Appendix hereto. The relevant part of the rules is an omission, namely, their failure to provide a procedure for examinees to seek redress for substantive errors in the grading of the examination.

Alabama Code § 34-3-2, § 34-3-43 (1975) are set out in full in the Appendix hereto. The appropriate provisions are:

§34-3-2: The Board of Commissioners of the State Bar shall have the following powers and authority in addition to the powers and authority heretofore conferred upon or vested in it:

> The board shall provide for a board of examiners on admission to the state bar and may prescribe rules and regulations governing the ... subjects ... the conduct of examiners ... and the certification of persons found to be qualified.

§34-3-43: The Board of commissioners shall have power:

> (1) To determine, by rules, the qualifications and requirements for admission to the practice of law;
>
> (2) To conduct through a board of examiners the examination of applicants.

Statement of the Case

Appellant was denied admission to the Alabama State Bar because of a substantive error in the grading of her bar examination, which prevented her from obtaining a passing score. This arbitrary action denied appellant of her constitutional right to practice a lawful profession.

Upon graduating from law school, appellant properly applied for and

was allowed to sit for the Alabama Bar Examination in July, 1979. In September, 1979, appellant received notice that she was unsuccessful in her attempt to pass the Alabama Bar Examination. Out of twelve written tests, the score on one examination was less than half of the average of appellant's remaining tests. This one particularly low score prevented appellant from achieving a passing score for the entire examination by .6 of a point.

In accordance with the proper procedures, appellant reviewed that examination, along with the model answer and the top three papers. This particular examination consisted of two parts, one which asked "how should a contract or note be executed in order to insure no liability on the part of the individual, but corporate liability", and two, "discuss individual and corporate liability under the alternative forms of executing documents (with five signatures listed)." The fact that two parts to the examination existed was indicated by two separate paragraphs, with appropriate question marks. Upon review of her examination, appellant discovered that credit was given only for her responses to the second part of the examination. This fact can be surmised because credit was determined on the basis of deductions from a total score of 100 points, with -10, -20, -20, -20 points being deducted from four out of the five responses. Appellant's response to the first part of the examination, which consisted of three legal size pages, received no recognition or credit whatsoever.

In addition, appellant discovered discrepancies in the grading of her responses to the second part of the examination as compared to case law, statutory law, and the top three papers. This portion was scored on an objective basis. This examination, appellant's responses, and the

discrepancies in case and statutory law and the top three papers are set out in the appendix.

Appellant notified Reginald T. Hamner, Executive Secretary of the Alabama State Bar of the alleged discrepancies and mistakes in the grading of her examination by letter. His reply was that a review of her examination was beyond the scope of review presently permitted under the Rules Governing Admission to the Alabama State Bar.

Appellant then filed a Petition of Mandamus before the Supreme Court of Alabama, requesting the court to require the Board of Commissioners of the Alabama State Bar to establish procedures that would provide redress for grievances for substantive errors in the grading of the examination, and; to admit her to the practice of law in the State of Alabama on the basis of her qualifications established in the July, 1979, Bar Examination.

In June, 1980, the Alabama Supreme Court ordered the Board of Commissioners of the Alabama State Bar to file an answer and brief to Item 24 of the petition, viz:

> "24. That the denial of a mode of redress for grievances resulting from mistakes and arbitrariness discovered in the grading of petitioner's July, 1979, Bar Examination constitutes a violation of the due process clause of the Fourteenth Amendment".

The Board of Commissioners filed an answer and brief, and appellant filed a brief in reply to the respondent's answer and brief.

In September, 1980, appellant received an order from the Supreme Court of Alabama which denied her petition for mandamus, with no opinion. Appellant then commenced this action, seeking redress for her grievances.

Appellant had relied on the most important arguments and vigorous

assertions of mistake, arbitrariness, and manifest unfairness in the grading of her examination to support her claim for relief. She did not emphasize fraud and intentional discrimination because of the burden of proof of certain elements which would require costs in time and money which were prohibitive to appellant. However, circumstantial evidence exists which indicates to appellant that the problems she has faced with the Alabama State Bar stemmed from her political activism in the area of environmental preservation. The appellant, who is licensed as an attorney in the State of Florida, established a public interest law firm in Birmingham, Alabama, which was designed to compel adherence to environmental laws by all members of the community, prior to her taking the Alabama Bar Examination. It was generally known that prior to the existence of this firm, the Legal Environmental Assistance Foundation, the State of Alabama had been without an enforcer of the public interest, and businesses had been able to circumvent the law in the environmental area.

Even though precise statistics are unavailable (requests for such figures have been denied by the Alabama State Bar), both racial and sexual discrimination have been apparent in the administration of the Alabama Bar Examination. Prior to appellant's petition for mandamus, the passage rate for these minorities was known to be significantly less than non-minority rates. The results of the Bar Examination, which took place after the filing of the petition and were announced by the Alabama Supreme Court on the same day as appellant's order from the Alabama Supreme Court, indicated that the passage rate for all examinees, regardless of race or sex, was well above 90%. This percentage was significantly higher than that for previous examinations.

Ultimately, in light of the direct evidence of mistake in the grading of appellant's bar examination and circumstantial evidence of fraud and intentional political, sexual, and racial discrimination, appellant's due process property right to practice a lawful profession has been severely violated by the Board of Commissioners of the Alabama State Bar.

Substantiality of the Questions Presented

Appellant was denied admission to the Alabama State Bar because of a mistake in the grading of her bar examination. The Rules Governing Admission to the Alabama State Bar fail to provide a mode of redress for substantive error in the grading of the examination. This constitutes a violation of the due process clause of right to property by denying appellant the right to practice a profession.

It has long been held by the United States Supreme Court that the right to work for a living in the common occupations of the community is the very essence of the personal freedom and opportunity that was the purpose of the Fourteenth Amendment to secure. Truax v. Raich, 239 U.S. 33, 41 (1915). The right to practice a profession is a very precious part of the liberty of an individual and may mean more than any property. Barsky v. Bd. of Regents of N. Y., 347 U.S. 442, 459 (1954). Ultimately, a citizen has the right to a fair opportunity to pursue an occupation, and this right is protected against unreasonable state interference. Bd. of Regents v. Roth, 408 U.S. 564 (1972); Hampton v. Mow Sun Wong, 426 U.S. 88, 102 (1976).

Additionally, the Supreme Court of the United States has long

recognized that this right to follow a lawful calling, business, or profession cannot arbitrarily be taken from a United States citizen, any more than their real or personal property can be thus taken. Dent v. W. Va., 129 U.S. 114, 121 (1889); Wieman v. Updegraff, 344 U.S. 183 (1952); Slochower v. Bd. of Educ., 350 U.S. 551 (1956).

This premise was clearly stated in Yick Wo v. Hopkins, 118 U.S. 356, 369 (1885), when the United States Supreme Court said:

> The nature and theory of our institutions of government do not mean to leave room for the play and action of purely personal and arbitrary power ... for the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails.

The Supreme Court of Alabama has held that the right to follow lawful employment of any ordinary and harmless calling, and that of entering the profession duly and reasonable regulated under the police power, are of constitutional quality that may not be abridged and are property rights that may not arbitrarily be denied without due process of law. State v. Woodall, 225 Ala. 178, 142 So. 838, 839 (1932); Barnes v. State, 274 Ala. 705, 151 So.2d 619 (1963).

There is little question but that an applicant for admission to the bar as an attorney is entitled to both substantive and procedural due process, and that Bar Examiners are subject to the requirements of the due process and equal protection clauses in the conduct of their duties. Feldman v. St. Bd. of Law Examiners, 438 F.2d 699, 703 (8th Cir. 1971); Richardson v. McFadden, 540 F.2d 744 (1976), cert. denied 435 U.S. 968 (1978). The following portion of the Supreme Court opinion in Schware v. Bd. of Bar Examiners, 353 U.S. 232, 239 (1957) is apposite:

> "We need not enter into a discussion whether the practice of law is a 'right' or a 'privilege'. Regardless of how the State's grant of permission to engage in this occupation is characterized, it is sufficient to say that a person cannot be prevented from practicing except for valid reasons. Certainly the practice of law is not a matter of the State's grace."

Ultimately, lawyers and courts should be especially sensitive of, and have a special obligation to respect, the demands of due process. Willner v. Comm. on Character, 373 U.S. 96 (1963).

The particular task of determining what due process safeguards should be afforded an applicant to the practice of law was discussed in Goldsmith v. BTA, 270 U.S. 117 (1925). The United States Supreme Court recognized that the rules adopted by the Board of Tax Appeals provide that "the board may, in its discretion, deny admission, suspend, or disbar any person". At the same time, the court also emphasized that this rule must be construed to mean the exercise of a discretion to be exercised after fair investigation, with such notice, hearing, and opportunity to answer for the applicant as would constitute due process.

The outer limits of court action dealing with the admission to the practice of a profession are described in Barsky v. Bd. of Regents of N. Y., 347 U.S. 442, 469 (1953) (Frankfurter, J. dissenting) where it is said:

> The highest court of the State of New York tells us in effect, "Yes, it may be that the Regents arbitrarily deprived a doctor of his license to practice medicine, but the courts of New York can do nothing about it". Such a rule of law, by denying all relief from arbitrary action, implicitly sanctions it; and deprivation of interests that are a part of a man's liberty and property, when based on such arbitrary grounds, contravenes the Due Process Clause of the Fourteenth Amendment.

The test of whether a Board of Commissioners of a State bar has acted arbitrarily and abused its discretion in refusing admission to a bar applicant is whether the findings are supported by substantial

evidence in light of the whole record. Application of Peterson, 499 P.2d 304, 306 (Alas. 1972).

Concededly, the standard of review by courts of administrative decisions is a deferential one; the courts must not substitute their judgment for that of the agency. However, a court does not depart from its proper function when it undertakes a study of the record, for this enables the court to penetrate to the underlying decisions of the agency, and to satisfy to itself that the agency has exercised a reasonable discretion. Ethyl Corp. v. EPA, 541 F.2d 1, 34 (D.C. Cir. 1976). If courts were to rubberstamp all administrative decisions as correct, the appellate process would be rendered a superfluous ritual. A reviewing court must examine the record in detail in order to determine whether an agency has lived up to its responsibility of basing its decision on a consideration of all the relevant facts. NRDC v. NRC, 547 F.2d 633 (D.C. Cir. 1976).

Altogether, the decision of the Alabama Supreme Court, which condones the arbitrary action of the Board of Commissioners of the Alabama State Bar by failing to provide a mode of redress to correct a substantive error in the grading of a bar examination and denies the due process right to practice a profession, is impossible to justify on any reasoned basis and merits swift, summary reversal by this Court.

"Arbitrary action" has been similarly defined by numerous courts. An "arbitrary act" or decision is one that is arrived at through the exercise of will or caprice, one supported by mere option or discretion, and not by fair or substantial reason. Bedford Inv. Co. v. Folk, 79 Cal.2d 363, 180 P.2d 361, 362 (1947). As respects judicial, refusal of the administrative board to consider evidence is "arbitrary action". Heaps v. Cobb, 185 Md. 374, 45 A.2d 73, 76 (1945). Furthermore, it is

arbitrary and capricious for an agency not to take into account all relevant factors in making its determination. Appalachian Power Co. v. EPA, 477 F.2d 495 at 507 (4th Cir. 1973).

The United States Supreme Court has considered the question of whether and when a court should review an administrative decision in Citizens to Preserve Overton Park v. Velpe, 401 U.S. 402, 416 (1971). Here the court stated that in making a finding of whether the actual decision was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law", the court should consider whether the decision was based on a consideration of the relevant facts and whether there has been a clear error of judgment. It has also been held that courts should engage in a substantial inquiry into the reasonableness of the agency action in order to insure that the record of the administrative body indicates that all factors were weighed by that body and supports the decision which was reached. Md. v. EPA, 530 F.2d 215 (4th Cir. 1975).

The questions presented by this case are of great and recurring significance in the administration of the legal profession and elsewhere. The serious questions of public policy involved here and the effect of the decision below, if unreversed, upon the integrity of the administration of justice, make this case a peculiarly appropriate one for the exercise of the Court's jurisdiction.

The importance of fairness, especially as it relates to our system of justice, has been described by Justice Powell in Regents of Univ. of California v. Bakke, 438 U.S. 265 (1978), where he said, "Fairness in individual competition for opportunities, especially those provided by the State, is a widely cherished American ethic. Indeed, in a broader sense, an underlying assumption of the rule of law is the worthiness of

a system of justice based on fairness to the individual."

Furthermore, the interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been "officers of the courts." Goldfarb v. Va. St. Bar, 421 U.S. 773 (1975); Sperry v. Florida, 373 U.S. 379 (1963); Cohen v. Hurley, 366 U.S. 117 (1961).

Thus, to a wise and deep extent, the law depends upon the disciplined standards of the profession and belief in the integrity of the Courts. The bar does not enjoy prerogatives, it has been entrusted with anxious responsibilities. All of the interests of man that are comprised under the constitutional guarantees given to "life, liberty, and property" are in the professional keeping of lawyers. This philosophy was summarized in Schware v. Bd. of Bar Examiners, 353 U.S. 232, 249 (1957), where the Supreme Court said, "We cannot fail to accord confidence to the State process, and we must attribute to its courts the exercise of a fair and not a biased judgment in passing upon the application of those seeking entry into the profession".

Review by this Court is necessary to correct a situation which, if left as is, will severly impair the confidence of the public in the integrity of the courts. A policy in which bar examination errors go undetected and uncorrected is an unfair policy devoid of prudential circumspection and proper protocol. The Board of Commissioners of the Alabama State Bar, endowed with the responsibility of administering entry into the profession whose purpose is to promote justice, should be equally endowed with the obligation of utilizing those pillars it is required to promote. Appellant urgently submits that this decision be set aside.

The issue of the right of an applicant to secure a hearing or appeal when she feels aggrieved by the results of the bar examination has been dealt with differently by various courts of last resort. Some courts suggest that review will be conducted only under special circumstances, i.e. where the applicant's petition shows that she was denied certification as a result of fraud, imposition, or coercion. Ex Parte Ross, 196 Ga. 499, 26 S.E.2d 880 (1943); In re Myers, 64 Nev. 217, 180 P.2d 99 (1947). In other jurisdictions, courts apply a more liberal test for review, and suggest as a prerequisite a less aggravated level of wrongdoing on the part of the bar examination board, i.e. when there has been unfairness or arbitrariness. In re Reid's Petition, 76 Nev. 76, 349 P.2d 446 (1960); In re Monoghan, 126 Vt. 193, 225 A.2d 387 (1967). Finally, other courts deny review only where the bar examination requirements are not "unreasonable" or "oppressive". In re Avery's Petition, 44 Hawaii 597, 358 P.2d 709 (1961).

In addition, there is wide variation among the states on the availability of grievance procedures dealing with bar examination. Many states have statutorily established a formal procedure for petitioning the State's highest court for review of an adverse determination by a board of bar examiners who failed to certify that an applicant has passed a bar examination. Richardson v. McFadden, 563 F.2d 1130 (4th Cir. 1977). According to F. Klein, Bar Admission Rules and Student Practice Rules, at 34-36 (1978), at least twenty-five states guarantee such grievance procedures as review of paper, appeal to examiners, and appeal to the court.

Direct conflict exists between the Supreme Court of Alabama and another state court of last resort, the Supreme Court of Alaska. While

the Supreme Court of Alabama denied review of appellant's bar examination in face of arbitrary grading, the Supreme Court of Alaska itself reviewed a bar examination in Application of Peterson, 499 P.2d 304 (Alas. 1972). The court explained:

> In the interest of fairness, since Petitioner was denied the sort of review of his hearing which we would have preferred, and which we will require in the future, we have chosen to read the examination and his answers and to compare his answers with the model answers and the representative passing and failing answers.

This court review of a bar examination came after the court's previous order to the State bar to regrade the examination, and its failure to properly do so in Application of Peterson, 459 P.2d 703 (Alas. 1969). Ultimately, this case represents the situation where a state court of last resort has decided a federal Constitution question in a way in conflict with the decision of another state court of last resort.

Sister circuits are also in conflict regarding the proper remedy to correct an error in the grading of a bar examination. Certain circuits have held that the right to re-examination provides a proper remedy for a mistake in the grading of an examination. Whitney v. Ill. Bd. Law Examiners, 504 F.2d 474 (7th Cir. 1974); Tyler v. Vickery, 517 F.2d 1089 (5th Cir. 1975), cert. denied 426 U.S. 940 (1976). Other circuits are not persuaded that the right to re-examination provides a proper remedy. The Fourth Circuit explained in Richardson v. McFadden, 540 F.2d 744 (1976), cert. denied 435 U.S. 968 (1976):

> To our knowledge, a person is not required by a state to repeatedly demonstrate his competence to practice law. The rule is "once is enough" and the reason for that rule is that it takes work, effort, and nowadays, money to prepare for a bar examination. Moreover, the license is deemed of sufficient value that delay in getting it is an injury.

Consequently, the decision of the Supreme Court of Alabama is in

conflict with the decision of other state supreme courts, and even when it is not in conflict, the issue of the proper remedy for a substantive error in the grading of a bar examination is of such far-reaching importance, it should not be left undecided by the highest court in the land. Since our system of justice is uniform, so should be the procedures designed to administer entry into the profession dedicated to protecting justice. For this reason, the Supreme Court of the United States should grant review.

The important nature of the issue of the proper administration of the practice of law has already been recognized by this Court regarding character assessment in application to a state bar. A series of Supreme Court decisions have addressed this issue. Schware v. Bd. of Bar Examiners, 353 U.S. 232 (1957); Konigsberg v. State Bar of Calif., 353 U.S. 252 (1957) and 366 U.S. 36 (1961); Willner v. Comm. on Character, 363 U.S. 96 (1963); Baird v. St. Bar of Ariz., 401 U.S. 3 (1970); Law Students Civil Rights Research Council, 401 U.S. 154 (1971).

The vital questions regarding the substance of the bar examination procedure remain unanswered by this Court. This Court has stated that final action on an application to the state bar is by the state supreme court, and review from an adverse decision is secured by petitioning the United States Supreme Court. Schware v. Bd. of Bar Examiners, 353 U.S. 232 (1957); Konigsberg v. State Bar of Calif., 353 U.S. 252 (1957); Theard v. U.S., 354 U.S. 278 (1957). Three circuits are in accord: Doe v. Pringle, 550 F.2d 596 (10th Cir. 1976), cert. denied 431 U.S. 916 (1977); Feldman v. St. Bd. Law Examiners, 438 F.2d 699 (8th Cir. 1971); Mac Kay v. Nesbett, 412 F.2d 846 (9th Cir. 1969), cert. denied 396 U.S.

960 (1969). The abstention of lower federal courts from reviewing orders of state courts relating to the admission of members of its bar is explained in Mac Kay v. Nesbett, 412 F.2d 846 (9th Cir. 1969). The court stated that this rule serves substantial policy interests arising from the historic relationship between state judicial systems and members of their respective bars, and between state and federal judicial systems.

The Supreme Court of Alabama sought to avoid the difficult constitutional question regarding bar examination procedures by summarily denying appellant's petition of mandamus. However, this fundamental constitutional question should not be so easily avoided. The order below is a departure from guarantees of the right to practice a lawful profession without arbitrary interference by the State. As such, it represents a breach in the wall erected by the Fourteenth Amendment to the Constitution and the decisions of this Court which were designed to protect those rights. Ultimately, this case represents a matter of substantial public importance and concern, and should be reviewed by this Court.

Conclusion

The decision below upholding the Rules Governing Admission to the Alabama Bar should be summarily reversed and sent back to the Alabama Supreme Court for a decision on the proper mode of redress to be established by the Board of Commissioners of the Alabama State Bar for a substantive error in the grading of a bar examination. In addition, appellant should be admitted to the practice of law in the State of Alabama, on the basis of her qualifications established in the July, 1979, bar

examination. Any other remedy this Court deems proper should be ordered. Alternatively, this appeal should be accorded plenary review.

Respectfully submitted,

Barbara Sue Ruhl

Barbara Sue Ruhl
Pro Se
2333 Center Way
Birmingham, Alabama 35205
(205) 322-3783

STATUTORY PROVISIONS

§ 34-3-2. Board of Examiners.

The board of commissioners of the state bar shall have the following powers and authority in addition to the powers and authority heretofore conferred upon or vested in it:

> The board shall provide for a board of examiners on admission to the state bar and may prescribe rules and regulations governing the selection of examiners, their number, tenure, compensation and authority, the subjects upon which candidates for admission shall be examined, the conduct of examiners, the time and place of meetings and the certification of persons found to be qualified.

§ 34-3-43. Powers generally.

The board of commissioners shall have power:

(1) To determine, by rules, the qualifications and requirements for admission to the practice of law;

(2) To conduct through a board of examiners the examination of applicants; and such board of examiners shall certify to the supreme court the names of the applicants found to be qualified; such certifications shall entitle such persons to be enrolled in the bar of the state and to practice law; provided, that the fees required are paid.

RULES GOVERNING ADMISSION

TO THE

ALABAMA STATE BAR

Adopted by the Board of Commissioners of the Alabama State Bar and approved by the Supreme Court of Alabama

March, 1980

ALABAMA STATE BAR
TELEPHONE 205-269-1515
415 DEXTER AVENUE
P. O. BOX 671
MONTGOMERY, ALABAMA 36101

19____ to be held in Montgomery, at

_____.

COMMITTEE ON CHARACTER AND FITNESS
OF THE ALABAMA STATE BAR

BY_____
Secretary, Board of Commissioners of the State Bar

Such certification shall be filed by the applicant with the Board of Bar Examiners before such applicant enters upon the examination, and the Board of Bar Examiners shall not examine any applicant by whom such certificate has not been filed. Upon the filing of such certificate the member of the Board of Bar Examiners by whom it is received shall endorse thereon the date when it was filed with him or with the said Board. The certificate so filed and endorsed shall be retained by the Board of Bar Examiners and kept among its records for the purpose of showing the right of the said applicant to take the examination. The Secretary of the Board of Commissioners of the Alabama State Bar, upon issuing or refusing to issue the said certificate, shall preserve in his office a record of the fact that such certificate was or was not issued and the date of such action, and shall preserve in his office said application with the papers attached thereto, and other records in connection with the said application, all of which shall be kept on file until the examination is completed, report made thereon, and pending application finally disposed of. If an applicant is not admitted to the practice of law, the application and all other papers in connection therewith shall be kept on file in the Secretary's office for reference in connection with any future application for admission to the Bar, or for investigation and examination of the record by any person entitled thereto.

RULE VI

BOARD OF BAR EXAMINERS

A. Creation of Board.

In accordance with the provisions of Act 436 of the Legislature of Alabama of 1949, approved August 23, 1949 (§ 34-3-2, Code of Alabama, 1975), there is hereby created a Board of Examiners on admission to the Alabama State Bar, which Board shall hereafter be designated and known as the Board of Bar Examiners.

B. Election of Examiners.

The Board of Bar Examiners shall consist of thirteen (13) members who are residents of the State of Alabama, and who are licensed attorneys of the Bar of this State. Twelve (12) of these thirteen (13) examiners shall examine in the academic subjects covered on the examination. One examiner shall be elected Chairman of the Board of Bar Examiners, but shall have no examining responsibilities. In lieu of examining responsibilities, the Chairman shall supervise and direct the activities of the Board of Bar Examiners within such rules as are promulgated for the Board of Bar Examiners. The Chairman shall be compensated as are all academic subject examiners. The Board of Bar Examiners shall hold office at the pleasure of the Board of Commissioners of the Alabama State Bar and may be removed from office with or without cause by a majority vote of those present at any meeting of the Board of Commissioners where a quorum is present. However, no examiner may serve more than four (4) consecutive years, after October, 1976, without the prior approval of the Board of Bar Commissioners.

80-5972

C. Compensation of Members.

Each member of the Board of Bar Examiners who examines in the academic subjects shall receive as compensation the sum of Seven Hundred Fifty Dollars ($750.00) for the February Bar Examination and One Thousand Dollars ($1,000.00) for the July Bar Examination. In addition thereto, examiners shall be reimbursed for reasonable and necessary traveling and other expenses incident to conducting such examinations. These expenses shall include books, postage, stationery, supplies, printing and other expenditures in the discharge of their duties. The members of such Board shall submit statements for their compensation and expenses on forms provided by the Secretary.

D. Vacancies and Removal from Office.

Any vacancy on the Board of Bar Examiners shall be filled by the Board of Commissioners of the Alabama State Bar. Interim appointments for no more than one exam may be made by the Chairman with the approval of the Executive Committee of the Board of Bar Commissioners.

E. Selection of Examiners.

The Advisory Committee to the Board of Bar Examiners, appointed by the President of the Alabama State Bar, shall serve as a nominating committee to nominate persons for membership on the Board of Bar Examiners.

F. Organization and Authority of the Board.

The Board of Bar Examiners shall be chaired by the elected Chairman who cannot succeed himself in office. The Secretary of the Alabama State Bar shall serve as Secretary ex-officio.

A quorum for any meeting shall consist of seven (7) members. A vote of the majority of the Board of Bar Examiners present at any meeting shall constitute the action of said Board.

The Board of Bar Examiners shall examine such applicants for admission to the Bar of Alabama as may be certified to the Board under these rules and shall perform such other duties as may be required of them by the Board of Commissioners of the Alabama State Bar.

G. Time and Place of Meeting.

The Board of Bar Examiners shall hold meetings for the purpose of examining applicants for admission to the Bar at least twice each year at such time and place as the Board of Bar Examiners determines. All of the members of the Board are not required to be in attendance throughout the examination; however, each examiner should be present to administer that examination for which the examiner is responsible unless excused by the Chairman of the Board of Bar Examiners. The Board of Bar Examiners shall hold such other meetings as are necessary to fulfill its function. The Board shall meet at the call of the Chairman or a majority of the Board of Bar Examiners.

H. Bar Examination Subjects.

(1) Academic Subjects.

(a) Essay. The Board of Bar Examiners will conduct an examination in the following subjects: Wills, Trusts and Estates; Pleading and Practice (State and Federal); Taxation; Business Organizations, including partnerships and other forms of business association; UCC; and Equity.

(b) Multistate. This portion of the examination will cover the following subjects: Contracts, Torts, Real Property, Evidence, Criminal Law, and Constitutional Law.

(2) Legal Ethics. The Multistate Professional Responsibility Examination (MPRE) administered by the National Conference of Bar Examiners and American College Testing shall be used as the examination on Legal Ethics and Professional Responsibility.

An applicant must pass both the Academic Exam-

ination and the Ethics Examination to be certified as a successful candidate.

I. Preparation, Conduct and Grading of Examinations.

(1) Preparation of Examinations. The essay portion shall consist of six subjects of two parts each, with one examiner responsible for one half of the subject examined. The two examiners in each subject will be deemed co-examiners.

All essay examination questions will, to the extent possible, follow the following criteria:

A question should require the examinee to understand a brief statement of facts, to analyze it in terms of fundamental legal principles, and to base his answer upon reasoning from legal principles.

A question should generally present more than one main issue for discussion.

A question should not be used if it would permit an erroneous conclusion on a single issue to prevent the examinee from ever getting on the right track and seeing the other issues involved.

A question should not be based upon an unusual or exceptional rule of law or upon an obscure local statute or regulation, unless the text thereof is set out.

A question ordinarily should not be based upon a fact pattern of a recently decided case.

A question should contain no misleading statements or "trick" questions.

A question should be well organized and written in clear, concise sentences. There should be nothing in the question that would be ambiguous to a reasonably intelligent law

student. All words and phrases that can be eliminated without detracting from the clarity or intended scope of the question should be eliminated.

A question should not involve too many parties, and it should identify each party in a manner designed to aid the examinee in keeping the parties straight. Pronouns should be used very sparingly, and when used, there should be no doubt as to the antecedent. Verbs or participles that would possibly have more than one subject or refer to the act of more than one party should be avoided.

A question, in its final query or instructional statement, should be very carefully worded and free of any trace of ambiguity.

Each examiner shall prepare the essay question(s) and a model answer(s) thereto at least two (2) months prior to the bar examination.

The examiner shall furnish the question(s) and the model answer(s) to the co-examiner in the subject area, who will check the question(s) and model answer(s) for compliance with the above standards, clarity, mistakes, misleading statements and overall fairness. The co-examiner will advise the author of his comments. The author shall make such changes as are mutually agreed upon with the co-examiner. The final draft of the question(s) and the model answer(s) will be forwarded to the Secretary of the Board of Bar Examiners.

(2) Conduct of Examinations. The Board of Bar Examiners shall have the right, power and authority to adopt rules not inconsistent with the laws of the State of Alabama, or the orders of the Supreme Court or the Board of Bar Commissioners governing the control, methods and details of conducting such examinations.

The Secretary of the Board of Bar Commissioners, at the time he issues to an applicant the certificate hereinabove provided for, shall issue to

the applicant also a card containing a personal distinguishing number, the purpose and use of which shall be carefully explained to the applicant, and shall preserve a duplicate thereof in this office. In standing the examination, the applicant may not sign his/her name to or upon any paper or document, or otherwise identify his/her examination answers than by said number, and is hereby forbidden to disclose this number to any member of the Board or to any other person whomsoever. If any applicant violates this requirement in any particular, the applicant's examination papers shall not be considered by the Board of Bar Examiners, and if it be discovered that such disclosure was made the applicant shall be subject to disciplinary action for deceit and misrepresentation. This requirement shall again be called to the attention of the applicant by the Board of Bar Examiners before he/she is permitted to begin the examination.

It is the express purpose hereof to provide a method whereby the Board of Bar Examiners, in passing upon the sufficiency of answers to questions propounded by it, shall be unacquainted with the identity of the person whose answers it is passing upon.

The members of the Board of Bar Examiners may divide among themselves the subjects to be covered by the examination, allocating to each member such subjects as the Board shall designate to be covered by such member. In propounding questions to applicants, it shall not be necessary that the examining member of the Board segregate the questions by subjects, nor that he designate the subject or subjects covered by any question or set of questions so propounded. Upon completion of the examination, each member of said Board shall determine the grade earned by each applicant in each subject covered by such member in the examination and shall certify such grades to the Secretary of the Board of Commissioners of the Alabama State Bar, using the numbers assigned to the respective applicants to identify them.

(3) Grading of Examinations. Essay questions will test the applicant's ability to reason logically, to analyze accurately legal problems, and, to demonstrate

a knowledge of the fundamental principles of law and their application. The grade of the paper shall be measured by the reasoning power shown as well as by the correctness or incorrectness of the answers.

Each examiner shall grade his/her own examination papers. After completing the initial grading of all of the examination papers, the examiner may review any grades, but must review all grades which are between 65 and 69, inclusive.

An examiner will be expected to grade the number of papers daily which will permit his/her grades to be received by the Secretary of the Alabama State Bar no later than April 15th following a February examination, and September 15th following a July examination. In the event of the death, disability or other emergency involving an examiner prior to the submission of the grades on his/her portion of the examination, the Advisory Committee of the Board of Bar Commissioners for Bar Examinations shall determine the procedures to be followed in grading those papers.

The Secretary shall make a permanent record in his office of the grades attained by each examinee in each subject, and shall inform each examinee whether he/she has passed or failed in the examination.

An examinee who fails the academic bar examination will be furnished the following information at the time of notification of the failure: the Multistate raw score and the grade made on each essay examination. As soon as the national median on the Multistate bar examination is available, this information will be furnished upon request.

Within sixty (60) days after the announcement of the results, a failing examinee shall be entitled to examine his/her own papers in the State Bar Headquarters for the purpose of ascertaining that grades were transcribed correctly, and upon payment of $5.00 per section of any essay examination, the examinee will be entitled to receive a copy of the question(s), of his/her answer and the model answer, and to examine at Bar Headquarters three top papers on that particular examination.

J. Results of Examinations.

Except as hereinafter provided, an examinee will be deemed to have passed the Academic bar examination under either of the following conditions:

(a) The examinee makes on the MBE a grade equal to or greater than the median score of all persons taking the examination in Alabama and elsewhere and makes an average of 70 on the subjects on which the BBE prepares and grades the papers.

(b) An examinee makes a combined score of at least 70, giving the scores of the MBE and the scores of the BBE equal weight, after adjustment of the MBE score by Method I in the National Conference of Bar Examiners Manual for the Interpretation and Use of Scores of the Multistate Bar Examination.

There are three exceptions to the above rule:

(1) A prospective examinee who has taken and successfully passed a bar examination in another jurisdiction after February 1, 1978, which bar exam included the Multistate, and who made the national median on the Multistate bar examination in that jurisdiction, may elect, on any examination in Alabama within a 20-month period from the date of his/her taking said multistate examination, to:

(a) Take the entire Academic bar examination, in which event the examinee will be graded in accordance with the basic rule; or,

(b) Take only the essay portion of the Academic bar examination, in which event the examinee will be deemed to have passed the Academic bar examination if the examinee makes an average of 70 on those subjects which the BBE examine.

(2) An examinee who has taken and failed

the entire Academic bar examination, but who made the national median on the Multistate bar examination, may elect, on any future examination in Alabama within a 20-month period from the date of his/her taking said Multistate examination, to:

(a) Retake the entire Academic bar examination, in which event the examinee will be graded in accordance with the basic rule; or,

(b) Take only the essay portion of the Academic bar examination, in which event the examinee will be deemed to have passed the Academic bar examination if the examinee makes an average grade of 70 on those subjects which the BBE examine.

(3) An examinee who has taken and failed the entire Academic bar examination, but who made an average grade of 70 on those subjects which the BBE examine, may elect, for any future examination for which the examinee is otherwise eligible within a 20-month period from the date of his/her taking said Multistate examination, to:

(a) Retake the entire Academic bar examination, in which event the examinee will be graded in accordance with the basic rule; or,

(b) Take only the Multistate portion of the Academic bar examination, in which event the examinee will be deemed to have passed the Academic bar examination, provided he/she makes the national median on the examination.

Carryovers or transfers-in under the above three rules are good for only 20 months from the time the examination was taken.

Elections regarding the transfer in from other jurisdictions of a Multistate score, or the carryover of the successful Multistate score or essay score from a previous Alabama examination, must be made at the time any application is filed.

An applicant who fails either the essay or multistate portion of the Academic examination, or who fails the Ethics Examination may retake that portion within 20 months of the failure without being required to retake the portions passed at the next regularly scheduled examination at which eligibility is established under Rule IV(D).

K. Multistate Professional Responsibility Examination.

Before admission to the Bar, each applicant must have successfully passed the Multistate Professional Responsibility Examination (MPRE). To complete successfully the MPRE, the applicant must have achieved a scaled score of at least 28 as that score is determined by the testing authority. Successful completion of the MPRE by an applicant at any time within the twelve month period prior to the taking of the Academic Bar Examination will be accepted and such successful completion may be carried over for a period of twenty months from the time that the first Academic Bar Examination is taken, if such Academic Bar Examination is not passed. If an applicant has passed the Academic Examination, but has not successfully completed the MPRE, he shall have a period of twenty months from the date of the Academic Examination in which to successfully complete the MPRE.

L. Time of Bar Examinations

Each examination will be given on Monday, Tuesday, and Wednesday of that week in February and July on which the Multistate examination is administered. The essay examinations will be on Monday and Tuesday, and the Multistate on Wednesday.

RULE VII

ADMISSION OF NONRESIDENT ATTORNEYS PRO HAC VICE

Any member of the Bar of another State or jurisdiction actually engaged in any cause or matter pending in any court of this State, may be permitted by such court to appear in and conduct such cause or matter while retaining his/her residence in another State without being subject generally to the rules regarding admission to the Bar of this State, provided that he/she first be introduced and recommended to such court by a member of the Board of Commissioners of the Alabama State Bar, such introduction and recommendation to be either in person or by a written communication, otherwise such attorney may not appear as an attorney in any court of this State.

MAILING ADDRESS:
P. O. BOX 157
MONTGOMERY, ALABAMA 36101

TELEPHONE: 832-6480

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

September 26, 1980

80-5972

Re: 79-570
EX PARTE: BARBARA SUE RUHL
PETITION FOR WRIT OF MANDAMUS TO THE ALABAMA STATE BAR
(Re: Barbara Sue Ruhl vs. Alabama State Bar)
Appellant Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

____ Appeal docketed. Future correspondence should refer to the above number.

____ Court Reporter granted additional time to file reporter's transcript to and including

____ Clerk/Register granted additional time to file clerk's record/record on appeal to and including

____ Appell_____ granted 7 additional days to file briefs to and including

____ Appellant(s) granted 7 additional days to file reply briefs to and including

____ Record on Appeal filed

____ Appendix Filed

____ Submitted on Briefs

____ Petition for Writ of Certiorari denied. No opinion.

____ Application for rehearing overruled. No opinion written on rehearing.

____ Permission to file amicus curiae briefs granted

XXXX PETITION FOR WRIT OF MANDAMUS DENIED - NO OPINION.
ALL THE JUSTICES CONCUR.

9-26-80
WO

J. D. Sentell
Clerk, Supreme Court of Alabama

RECEIVED
DEC 29 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE STATE OF ALABAMA

BARBARA SUE RUHL,)
)
Appellant,)
)
v.) No. 79-570
)
ALABAMA STATE BAR,)
)
Appellee.)

80-5972

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Barbara Sue Ruhl, the petitioner above named, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of Alabama denying the petition for writ of mandamus, number 79-570, entered in this action on September 26, 1980.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Barbara Sue Ruhl
Pro Se
2333 Center Way
Birmingham, Alabama 35205

June 9, 1980

THE STATE OF ALABAMA - JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

OCTOBER TERM 1979-80 80-5572

79-570

EX PARTE: BARBARA SUE RUHL, PETITIONER

PETITION FOR WRIT OF MANDAMUS

(In Re: Barbara Sue Ruhl v. Alabama State Bar)

ORDER

The petition of Barbara Sue Ruhl for writ of mandamus to the Board of Commissioners of the Alabama State Bar having been filed and submitted to the Court,

IT IS ORDERED as follows:

(1) That the Board of Commissioners of the Alabama State Bar file with the Clerk of this Court within fourteen (14) days from the date of this order its answer to Item 24 of the petition, viz:

> "24. That the denial of a mode of redress for grievances resulting from mistakes and arbitrariness discovered in the grading of petitioner's July, 1979 Bar Examination constitutes a violation of the due process clause of the Fourteenth Amendment,"

together with a full statement of the facts upon which the answer is based.

(2) That a brief in support of the answer of the Board of Commissioners of the Alabama State Bar and nine copies thereof accompany the answer.

(3) That the petitioner may file a brief in reply to the answer and brief of the Board of Commissioners of the Alabama State Bar within seven (7) days after service of said Board's answer and brief upon petitioner.

(4) That the Clerk of this Court shall serve a copy of this order upon Oakley Melton, Jr., Reginald T. Hamner and William H. Morrow, Jr., President, Secretary and General Counsel, respectively, of the Alabama State Bar, by mailing a copy by United States mail, postage prepaid to their respective addresses.

All Justices concur, except Bloodworth, J., not sitting.

I, J.O. Sentell, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said Court.
Witness my hand this 10 day of Jan 1980

J.O. Sentell

Clerk, Supreme Court of Alabama

80-5972

RECEIVED
DEC 29 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

BARBARA SUE RUHL,	)
	)
Appellant,	)
	)
v.	)
	)
ALABAMA STATE BAR,	)
	)
Appellee.	)

ON APPEAL FROM THE SUPREME COURT OF ALABAMA

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Barbara Sue Ruhl
Pro Se
2333 Center Way
Birmingham, Alabama 35205
(205) 322-3783

RECEIVED
DEC 29 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

80-5972

BARBARA SUE RUHL,

Appellant,

v.

BOARD OF COMMISSIONERS OF ALABAMA STATE BAR,

Appellee.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Appellant Barbara Sue Ruhl moves the Court for an order permitting her to proceed in this Court, in forma pauperis, with her appeal from the judgment of the Supreme Court of the State of Alabama entered in this cause on September 26, 1980, pursuant to the provisions of Title 28, United States Code, Section 1915, and Rule 46 of the Rules of this Court, and in support thereof attaches the affidavit of said appellant. Leave to proceed in forma pauperis was not sought in the Petition to Mandamus before the Supreme Court of Alabama.

Appellant's jurisdictional statement is being filed with this motion and appellant's affidavit.

Barbara Sue Ruhl

Barbara Sue Ruhl
Pro Se
2333 Center Way
Birmingham, Alabama 35205
(205) 322-3783

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

RECEIVED
DEC 29 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

80-5972

BARBARA SUE RUHL,

Appellant,

v.

BOARD OF COMMISSIONERS OF ALABAMA STATE BAR,

Appellee.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, Barbara Sue Ruhl being first duly sworn, depose and say that I am the Plaintiff, in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present on appeal are provided in the jurisdictional statement.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed?

Yes

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

$5,000.00/year ; University of Alabama in Birmingham
University Station, Birmingham, Alabama 35294

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

Dividends

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

Dividends: $219.30 per quarter Southwest Florida Banks Inc.

3. Do you own any cash or checking or savings account?

yes

a. If the answer is yes, state the total value of the items owned.

savings: $150.00
checking: $50.00 (excluding loan monies for education)

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings or clothing)?

yes

a. If the answer is yes, describe the property and state its approximate value.

car: $1800.00
stocks: 1,462 shares @ $5.00 (approximately)

5. List the persons who are dependent upon you for support and state your relationship to those persons.

Michael Roy Duenas, husband

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Barbara Sue Ruhl

Barbara Sue Ruhl

SUBSCRIBED AND SWORN TO before me this 22nd day of January, 1980.

Let the applicant proceed without prepayment of costs or fees or the necessity of giving security therefor.

RECEIVED
MAR 21 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

BARBARA SUE RUHL,

APPELLANT,

VS.

ALABAMA STATE BAR,

APPELLEE

No. 80-5972

ORIGINAL COPY

MOTION TO DISMISS OR AFFIRM

Comes now the Appellee, the Alabama State Bar, by and through its undersigned attorney, and moves the Court to dismiss the appeal herein, or in the alternative, to affirm the order of the Supreme Court of Alabama (No. 79-570), dated September 26, 1980, and as grounds for said Motion alleges:

1) The appeal is not within the jurisdiction of this Court because not taken in conformity to statute or to the Rules of the Supreme Court of the United States since the Appellant has failed to file and serve, not more than ninety days after the entry of the judgement appealed from, a statement as to jurisdiction as required by Rule 13 and in compliance with Rule 15, Rules of the Supreme Court of the United States.

The Appellee has been served with only one instrument, namely, "Notice of Appeal To The Supreme Court of the United States". No statement as to jurisdiction as required by Rule 13 and in compliance with Rule 15, Rules of the Supreme Court of the United States, has been served on the Appellee, and to the knowledge of the Appellee, none has been filed.

Rule 13, Rules of the Supreme Court of the United States, expressly provides, inter alia:

> "1. Not more than ninety days after the entry of the judgement appealed from it shall be the duty of the appellant to docket the case in the manner set forth in paragraph 2 of this rule, ...
>
> 2. Counsel for the appellant shall enter his appearance, pay the docket fee, and file, with proof of service as prescribed by Rule 33, forty copies of a printed statement as to jurisdiction, which shall comply in all respects with Rule 15. ..."

Appellate jurisdiction is the threshold issue in any attempted appeal, and failure of an appellant to file the required statement as to jurisdiction should be treated as strictly jurisdictional.

Rule 16, Rules of the Supreme Court of the United States, expressly proivdes, inter alia:

> "(a) The court will receive a motion to dismiss any appeal on the ground that the appeal is not within the jurisdiction of this court, because not taken in conformity to statute or to these rules."

The Appellee respectfully submits that the Supreme Court of the United States is without jurisdiction and the attempted appeal should be dismissed.

2) The appeal should be dismissed on the ground that it does not present a substantial federal question.

Although neither the Appellant nor the Appellee has requested the clerk of the court possessed of the record to certify it or any part of it, at this posture of the case, some comment is deemed appropriate that the appeal does not present a substantial federal question.

On or about May 5, 1980, the Appellant filed with the Supreme Court of Alabama a "Petition For a Writ of Mandamus To Allow Petitioner To Be Admitted To The Practice of Law in The State of Alabama." Paragraph 24 of this petition recites:

> "24. That the denial of a mode of redress for grievances resulting from mistakes and arbitrariness discovered in the grading of petitioner's July, 1979, Bar Examination constitutes a violation of the due process clause of the Fourteenth Amendment."

The Supreme Court of Alabama directed the Alabama State Bar to file an answer and supporting brief directed only to the above-quoted paragraph of the "Petition For a Writ of Mandamus To Allow Petitioner To Be Admitted To The Practice of Law in The State of Alabama." An answer and supporting brief were duly filed resulting in the order of September 26, 1980, the subject of this appeal.

The Rules Governing Admission To The Alabama State Bar provide, in part:

> "Within sixty (60) days after the announcement of the results, a failing examinee shall be entitled to examine his/her own papers in the State Bar Headquarters for the purpose of ascertaining that the grades were transcribed correctly, and upon payment of $5.00 per section of any essay examination, the examinee will be entitled to receive a copy of the question(s), of his/her answer and the model answer, and to examine at Bar Headquarters three top papers on that particular examination."

Appellant availed herself of the above-quoted provision of the Rules Governing Admission To The Alabama State Bar as to one examiner on the subject of Business Organizations. No claim is made that there were arithmetical errors in the transcribing of grades; no claim is made that the examiner was guilty of dishonesty, fraud, misrepresentation or wilful discrimination. It was merely asserted that in the exercise of his judgement and discretion this particular examiner should have given the Appellant a higher grade. In effect, the Justices of the Supreme Court of Alabama were asked to regrade this paper and substitute their judgement and discretion for that of this examiner. There are numerous cases holding that courts, in the absence of allegations of dishonesty, fraud or wilful discrimination, will not sit as super bar examination graders and substitute their judgement and discretion for that of a bar examiner in grading essay type, timed, closed book bar examinations. See: Chaney v. State Bar of California, 386 F.2d (9th Cir. 1967), Arkansas Board of Law Examiners, 438 F.2d 699 (8th Cir. 1971), Tyler v. Vickery, 517 F.2d 1089 (5th Cir. 1975), In re Monaghan, 225 A.2d 387 (Vt. 1967), Staley v. Board of California, 109 P.2d 667, 17 Cal. 2d 119 (1941), In re Myles, 180 P.2d 99 (Nev. 1947), In re Chachas' Petition, 369 P.2d 455 (Nev. 1962).

As hereinabove stated, the Appellant did not contend that the examiner did not give her sufficient credit for her answers because of fraud or intentional discrimination. The anonymity of the examinees was not questioned. At most, she asserts that in the exercise of expert judgement another expert might have reached a different result.

If this Court should determine that the Appellant has the right to demand that a court examine her bar examination answer and hold a hearing to determine the skill of the bar examiner in grading her paper, then every unsuccessful applicant has a similar right. In the future, any unsuccessful examinee would have a hope that a court would review and reject the result reached by the appointed examiners. The courts would become super bar examiners -- if, indeed, the cost and time and money of such a judicial obstacle course did not bring about the demise of all professional examinations. If this is the result as to bar examinations, the public, the courts, and the administration of justice will be the losers.

Human nature being such as it is, we are all prone to rationalize. We dare say that every failing examinee upon comparing his answer with

the model answer and the answers of the examinees given top grades would sincerely believe that his answer should have been given greater credit -- whether by one point, five points, ten points or twenty points. This would be a very tempting rationalization where one or two points are crucial to the issue of admission or non-admission. The point spread is immaterial.

The Appellant does not accuse the examiner involved of fraud or wilful misconduct in the grading of her examination. If an examinee, upon examination of his examination paper and comparing it with a model answer and answers of examinees given top grades can in good faith assert that "mistakes and arbitrariness" were shown by the examiner and due process requires regrading by a court, then virtually every examinee inspecting such answers could require regrading.

Although the Alabama Rules Governing Admission To The Alabama State Bar permit an unsuccessful examinee to examine his examination paper, a model answer prepared by the examiner and the examination of papers of examinees receiving top grades, it should be pointed out that neither the Constitution of the United States nor any statute requires such review. If so, why should right be limited to bar examinations? Would a student in law school who failed a course thereby disqualyfying him for a law school diploma, have a Constitutional right to demand review of his examination papers? The National Conference of Bar Examiners has begun giving, in many states including Alabama, multistate bar examinations. There is no review available on a multistate examination. Does this deny Constitutional rights? Many law schools require a nationally administered law school aptitute test (L.S.A.T.) for entrance to the law school. Does a student who scores below the necessary entering level have a right of review? What of the right of review for college board scores? There is no such Constitutional or statutory right.

Successful completion of each step is necessary for obtaining a law license -- successful passage of undergraduate college courses, successful graduation from law school and successful passage of the bar examination. If due process requires the courts to inject themselves into the grading at one level, logic would require them to inject themselves into the grading process at every level.

CONCLUSION

This appeal should be dismissed or affirmed because the Appellant

did not perfect her appeal by filing a timely statement as to jurisdiction.

This appeal should be dismissed or affirmed because it does not present a substantial federal question.

Respectfully submitted,

William H. Morrow, Jr.
General Counsel
Alabama State Bar

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Dismiss or Affirm was served upon Barbara Sue Ruhl, 2333 Center Way, Birmingham, Alabama, 35205, by certified United States mail, postage prepaid, this 19th day of March, 1981.

William H. Morrow, Jr.
General Counsel
Alabama State Bar